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**Datasheet for the decision
of 10 March 2021**

Case Number: T 0828/18 - 3.2.07

Application Number: 11720193.9

Publication Number: 2560496

IPC: B65G9/00, A22C21/00

Language of the proceedings: EN

Title of invention:

ROTATABLE ARTICLE SUPPORT FOR A CONVEYOR

Patent Proprietor:

Foodmate B.V.

Opponent:

Marel Stork Poultry Processing B.V.

Headword:

Relevant legal provisions:

EPC Art. 56

RPBA Art. 12(4)

RPBA 2020 Art. 12(2), 12(3), 13(2), 15(1)

Keyword:

Inventive step - (yes)

Late-filed document - admitted (no)

Decisions cited:

T 0422/93, T 1030/06

Catchword:



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Case Number: T 0828/18 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 10 March 2021

Appellant: Foodmate B.V.
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
23 January 2018 concerning maintenance of the
European Patent No. 2560496 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Pieracci
S. Watson

Summary of Facts and Submissions

- I. Both the patent proprietor and the opponent lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division to maintain the European patent No. 2 560 496 in amended form.
- II. The opposition had been filed against the patent as a whole based on the grounds for opposition pursuant to Article 100 (a) and (b) EPC (lack of inventive step and insufficiency of disclosure).
The opposition division found the subject-matter of claim 1 of the patent as granted to be not inventive, the patent as amended according to the first to fourth auxiliary requests to be not allowable and the patent as amended according to the fifth auxiliary request to meet the requirements of the EPC.
- III. The following documents are referred to in the present decision:
- D1: EP 0 786 208 A1;
D2: US 2008/0303618 A1;
D3: US 3 240 304 A;
D4: US 3 344 378 A;
D5: US 2004/0050641 A1;
D6: US 3 848 827 A;
D11: US 3 934 216 A.
- IV. In preparation for the oral proceedings the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA 2020 dated 22 June 2020.

The Board indicated that the subject-matter of claim 1 of the patent as granted appeared to be inventive in view of the combination of the teaching of D1 with D2 and that it appeared that the objections of lack of inventive step in view of the combination of the teaching of D1 with any of D3, D4, D5 or D6 would not be admitted into the proceedings.

V. With letter dated 8 January 2021 the opponent contested the preliminary opinion of the Board and filed document D11.

VI. Oral proceedings before the Board took place on 10 March 2021, at the end of which the decision was announced. For further details of the oral proceedings reference is made to the minutes thereof.

VII. The final requests of the patent proprietor are

that the appealed decision be set aside and that the patent be maintained as granted, or in the alternative, when setting the decision aside,
that the patent be maintained in amended form on the basis of one of the sets of claims according to auxiliary requests 1, 2, 3, 4, 5, 5A, 5B, 5C, 6, 6A, 6B and 6C,
wherein the auxiliary requests 1 to 6 have been filed together with the statement setting out the grounds of appeal and the auxiliary requests 5A, 5B, 5C, 6A, 6B and 6C have been filed with the reply to the opponent's statement setting out the grounds of appeal.

VIII. The final requests of the opponent are

that the appealed decision be set aside and
that the patent be revoked in its entirety.

IX. The lines of argument of the parties are dealt with in detail in the reasons for the decision.

X. Claim 1 according to the patent as granted (main request) reads:

"Article support assembly (101) for movement by a conveyor along a path of conveyance, including:
a trolley (105) for engagement by the conveyor;
a shackle (103) configured to support an article, and rotatable with respect to the trolley;
a turning block (133) associated with the shackle, rotation of the turning block with respect to the trolley causing corresponding rotation of the shackle relative to the trolley; and
yieldable indexing means (123, 127, 129, 131) operatively arranged between the trolley and the turning block to define at least a first and a second incremental rotational position for the shackle, characterised by the fact that the yieldable indexing means are biased into engagement by magnetic forces."

XI. In view of the decision taken by the Board there is no need to reproduce claim 1 of the auxiliary requests.

Reasons for the Decision

1. Admittance into the proceedings of the inventive step objections of the subject-matter of claim 1 in view of the teaching of D1 in combination with any of D3, D4, D5 or D6
 - 1.1 The opposition division found that the subject-matter of claim 1 is inventive in view of the combination of the teaching of D1 with that of any of D3, D4, D5 or D6 and provided a detailed reasoning for this conclusion in points II.3.2.2 to II.3.2.4 of the decision.
 - 1.2 The opponent did not address the reasoning of the opposition division in relation to the above combinations of documents in either the written procedure or at the oral proceedings before the Board.
 - 1.2.1 In relation to the combination of D1 with D4 (see point 1.4 of the opponent's reply to the patent proprietor's statement of the grounds of appeal) the opponent repeats the argument presented at the oral proceedings before the opposition division (see point II.3.2.3, first paragraph of the decision) without indicating why it regards the reasoning of the opposition division expressed on the issue as incorrect, in particular with respect to the argument that in D4 there is no indication of any advantage that magnetic detents have over mechanical detents and that no hint can be found for the person skilled in the art to proceed in the way suggested by the opponent (see point II.3.2.3, second paragraph of the decision).

1.2.2 In relation to the combination of D1 with D3, with D5 and with D6 the opponent repeats *verbatim* its arguments presented in the notice of opposition (see points 2.2, 2.4 and 2.5 of the notice of opposition and points 1.5 to 1.7 of the reply to the patent proprietor's statement setting out the grounds of appeal) without indicating why the reasoning of the opposition division as outlined in points II.3.2.2 and II.3.2.4 of the decision is considered to be wrong.

1.3 Article 12(2) RPBA 2020 stipulates that in view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based. The opponent's appeal, however, is not substantiated in respect of the findings of the opposition division on inventive step of the claimed subject-matter in relation to a combination of the teachings of D1 with any of D3 to D6. Due to this lack of substantiation the opponent has not complied with the requirements for the statement setting out the grounds of appeal as set out in Article 12(3) RPBA 2020 for these lines of attack.

1.4 The above opinion of the Board was communicated to the parties with the communication pursuant to Article 15(1) RPBA 2020 and reiterated at the oral proceedings. The opponent did not reply to this issue in substance.

After having reconsidered all the legal and factual aspects of the case the Board does not see any reason for changing its preliminary opinion and decides not to admit the objections above into the proceedings pursuant to Article 12(4) RPBA 2007 in combination with

Article 12(2) RPBA 2007, which essentially corresponds to Article 12(3) RPBA 2020.

2. Admittance into the proceedings of document D11 and of the corresponding inventive step objection to the subject-matter of claim 1
 - 2.1 Document D11 has been filed by the opponent with its reply to the communication of the Board pursuant to Article 15(1) RPBA 2020. The opponent argues at the oral proceedings that document D11, which came to the attention of the opponent's professional representative only when discussing the present appeal case with a colleague, should be admitted into the proceedings since it is *prima facie* highly relevant and its filing was occasioned by the preliminary opinion of the Board that the technical field of document D2 relates to small electrical appliances and is different from that of document D1.
 - 2.2 According to Article 13(2) RPBA 2020, the admittance into the proceedings of amendments to a party's appeal case after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.
 - 2.3 As admitted by the opponent at the oral proceedings, the argument of differing technical fields of documents D1 and D2 was submitted by the patent proprietor with its statement setting out the grounds of appeal and thus the Board had not raised a new issue with its preliminary opinion. Therefore, the preliminary opinion of the Board cannot be seen as causing exceptional circumstances to arise, since it cannot be seen as

surprising that the Board appears to be convinced by the arguments of the other party. Otherwise, amendments to a party's appeal case would always have to be allowed whenever the Board expressed a preliminary opinion, rendering Article 13(2) RPBA 2020 ineffective.

2.4 The Board further concurs with the patent proprietor that neither the accidental retrieval nor the alleged relevance of document D11 can be seen, at least in the present case, as exceptional circumstances in the sense of Article 13(2) RPBA 2020 since it is the duty of any opponent to duly search for and timely identify relevant documents when preparing an opposition case.

2.5 Since exceptional circumstances cannot be identified nor any cogent reason supporting their alleged presence has been submitted, the Board does not admit D11 and the arguments based on it into the proceedings, pursuant to Article 13(2) RPBA 2020.

3. Inventive step of the subject-matter of claim 1 in view of the teaching of D1 in combination with that of D2 (Articles 100 (a) and 56 EPC)

3.1 The patent proprietor contests the finding of the opposition division (see the appealed decision, point II.3.2.1, in particular the penultimate paragraph) that the person skilled in the art when confronted with the problem of excessive wear of mechanical indexing components of D1 would consider the teaching of D2, referring to a general detent assembly, which can be adapted to the needs of a poultry processing line without the need of inventive skills, thus arriving at an article support assembly with yieldable indexing means biased into engagement by magnetic forces

according to the subject-matter of claim 1 of the patent as granted.

- 3.2 The Board concurs with the patent proprietor that the person skilled in the art, considering document D2, would not take it into account to solve the problem of reducing the risk of wear for the device of document D1, due to the fact that the specific examples given in D2 are quite far away from that of D1, namely a laptop (see figure 8 of D2) and a docking station for a hand-held device (see figure 9 of D2).
- 3.3 It can be agreed with the opposition division and the opponent that document D2 discusses in general terms the problem of wear and the solution provided by the use of magnetic forces (see page 5, fifth and sixth paragraphs, opponent's reply to the patent proprietor's statement setting out the grounds of appeal and point II.3.2.1 of the appealed decision), however it has to be noted that there is no teaching to be found in D2 for applying this concept, shown specifically only for the laptop of figure 8 and for the docking station of figure 9, to the poultry support shackle of D1 or to a similar device.
- 3.4 The Board furthermore concurs with the patent proprietor (see the paragraph bridging pages 4 and 5 of the patent proprietor's statement setting out the grounds of appeal) that the structural requirements and the design constraints of the specific examples of D2 and of the device of D1 are evidently different, so that the person skilled in the art, even willing to apply the teaching of D2, would not know how to implement it to the device of D1 without being inventive.

3.5 In fact, the Board cannot accept the argument of the opponent regarding the structural modification that the person skilled in the art would undertake to combine the teaching of D2 with D1 to arrive at the subject-matter of claim 1 (see page 7, last paragraph, to page 8, second paragraph, of the reply to the patent proprietor's statement setting out the grounds of appeal) since it remains unsubstantiated that the person skilled in the art would proceed in the way suggested by the opponent, in particular due to the geometrical and structural differences between the devices disclosed in D1 and in D2. This argument of the opponent is considered to be the result of an *ex-post facto* analysis.

3.6 It can be conceded that the teaching of D2 cannot be considered to be limited to the specific embodiments therein disclosed and that in particular in paragraph [0034] of D2 it is mentioned that

"...while these inventions have been described in the context of the above specific embodiments, modification and variations are possible..."

and that

"...shapes, dimensions, angles and sizes provided throughout the above description are for illustrative purposes only, and the inventive concepts described herein can be applied to structures with different dimensions..."

and that most of the claims of D2 are directed to a detent assembly in general and are not limited to the hinge of a small electronic appliance.

However, these statements on the general applicability of the teaching of D2 are considered by the person skilled in the art within the context provided by the specific examples presented in D2.

The person skilled in the art understands these statements as an indication that the detent assemblies of D2 could also be used in other kinds of devices, which are either similar to those of the specific examples, i.e. small electrical appliances, or have similar uses, geometries and load constraints, but not that the detent assemblies of D2 can be used in all other kinds of devices without restriction.

3.7 The Board is not convinced by the argument of the opponent, referring to chapter I.D.8.1.1 of the Case Law of the Boards of Appeal, 9th edition, 2019, in particular to T 1030/06 (not published in OJ EPO) and to T 422/93 (OJ 1997, 25), that the person skilled in the art in the technical field of poultry support assemblies would consult the person skilled in the art in the field of detent assemblies and then combine the teaching of figure 5 of D1 with that of figure 3 of D2 thus arriving at the claimed subject-matter.

3.8 The Board is of the opinion that the teaching of figure 3 of D2 cannot be isolated from the teaching of the whole document. Figure 3 refers to the general explanation of the functioning of the magnetic detent assembly of D2 which is applied, in practice, in the examples of the laptop of figure 8 and the hand-held device of figure 9. As indicated above, the general description of the invention of D2 is considered by the person skilled in the art, independently from the field in which they are skilled, within the context of the technical realization of the specific examples of D2,

so that they would not apply it to the device of D1 for the reasons previously outlined.

- 3.9 The argument of the opponent (see page 4, first paragraph of the letter dated 8 January 2021), that in analysing the issue of obviousness it should be taken into account that claim 1 is broadly drafted and directed to a support assembly in general and not limited to a poultry support assembly, does not lead to a different conclusion. As argued by the patent proprietor at the oral proceedings, the opponent has specifically identified the poultry support assembly of D1 as the closest prior art and the constraints implied by this choice cannot be disregarded.
- 3.10 The Board is therefore convinced by the argument of the patent proprietor that the subject-matter of claim 1 is not obvious in view of the combination of the teaching of D1 and D2.
4. In summary, in reviewing the decision under appeal, the Board finds that the patent proprietor has convincingly shown the incorrectness of the decision under appeal and its underlying reasons in respect of the issue of inventive step of the subject-matter of claim 1 of the patent as granted, whereas none of the opponent's objections and arguments, as far as admissibly raised, holds true against the patent as granted, so that the patent proprietor's appeal can be allowed, while the opponent's appeal consequently is to be dismissed.

Order

For these reasons it is decided that:

1. The appeal of the opponent is dismissed.
2. The decision under appeal is set aside.
3. The patent is maintained as granted.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated